Office-Supreme Court, U.S.
FILED
OCT 15 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 473

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA and ASSOCIATED MUSICIANS OF GREATER NEW YORK LOCAL 802,

Petitioners,

v.

BEN CUTLER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION.

GODFREY P. SCHMIDT,
Counsel for Respondent,
60 East 42nd Street,
New York 17, N. Y.

October 14, 1963

No. 346 Panduck Press, Inc., 22 Thames St., New York, N. Y. 10006, U. S. A.

INDEX.

	PAGE
Opinions Below	1
Statute and Union Regulations Involved	2
Questions Presented	2
Counterstatement of Case	3
A. The complaint	3
B. Cutler as Employer	3
C. Petitioners' exactions not "dues"	4
D. The 10% surcharge imposed only on leaders	5
E. The 10% surcharge not wages	5
F. Petitioners do not bargain with leader-employers	6
G. Leader pays both union exactions out of own funds	6
H. No basic conflict between decisions below	8
I. Trial Court's minor misconceptions corrected by Second Circuit	9
ARGUMENT:	
I. The Issues Are Not Novel	10
II. No Conflict Between Courts	10
III. The Issues Are Not of National Importance	11
IV. No Class Action is Involved	12
V. The Decisions Below Involve No Impact on the Operations of Other Labor Unions	13
VI. The Question Will Soon Become Moot	13

PAGE

VII. Petitioners Claim (P. p 6) that the Complaint Attacked Only Their "Method of Collection" 13

VIII. Obedience to the Statute Presents No Particular Difficulty to Other Unions. Why Should it be Difficult for Petitioners? 14

IX. Petitioners Ask This Court to Adjust an Alleged Conflict Between the Courts Below Respecting Relatively Important Findings of Fact 14

X. The Statutory Interpretation on Which the Decisions Below Were Predicated Was Not Destructive of Legitimate Interests of Labor Organizations 15

XI. The Interest of Unions to Enlist Employers Like Cutler as Distinguished from Self-Employed Peddlers 15

XII. The Decision Below Is Clearly Correct 17

XIII. The Decision Below Did Not Misconstrue §302 of the Act 20

XIV. Congress' Legislative Intent Was Not Violated by the Interpretation of §302 Made Below 20

XV. Cutler is an Employer Under the Test of "Right of Control" and the Test of "Economic Reality" 21

XVI. Rule 52(a) F. R. C. P. was not Violated 22

XVII. If Petitioners Really Believe that the Involved Exactions are "Membership Dues", Why Have They Failed to Obtain Wage Deduction Authorizations? 23

XVIII. The N. L. R. B. Decisions Cited by Petitioners do not Justify the Form B Contract; and in any Event that form is Irrelevant Here 23

PAGE

XIX. There is no Basis for Exercise of this Court's Supervisory Powers 23

XX. First Amendment Freedom of Association is not here Involved 24

Conclusion 25

Appendix A.—Opinion 26

Appendix B.—Article 15—10% Traveling Surcharge 35

Appendix C.—Standing Resolutions 40

Appendix D.—Form B Contract and Anaylsis 42

Table of Cases.

	PAGE
Allen-Bradley Co. v. *Local 3, I. B. E. W.*, 325 U. S. 797	17
Arroyo v. *United States*, 359 U. S. 419	11, 20
Bartels v. *Birmingham*, 332 U. S. 126	12
Cutler v. *United States*, 180 F. Supp. 360	6, 21
Graver Manufacturing Co. v. *Linde*, 336 U. S. 271	14
Hummel Brothers Co. v. *Serrick Corp.* (CCA 7, 1941), 122 F. 2d 740	22
Los Angeles Meat Drivers Union v. *United States*, 371 U. S. 94	15, 16
Sheet Metal Contractors Assn. v. *Sheet Metal Workers International Assn.* (CA 9), 248 F. 2d 307	11
United States v. *Johnston*, 268 U. S. 220	14
U. S. v *Gibas* (CA 7), 300 F. 2d 836	11
U. S. v. *Pecora* (CA 3), 267 F. 2d 512	11
U. S. v. *Ryan*, 350 U. S. 299	11, 20

Statutes.

Labor-Management Relations Act of 1947, as amended (61 Stat. 136 *et seq.*, 29 U. S. C. 141 *et seq.*),

Section 2(3)	2
Section 302	2, 3, 13, 15, 17, 18, 20, 21, 24, 25
Section 302(c)	10, 14, 19, 21, 23

Federal Rules of Civil Procedure,

Rule 52(a)	22
Rule 52(c)	2, 23

Miscellaneous.

Legislative History of the Labor-Management Relations Act, 1947	20, 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 473

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA and ASSOCIATED MUSICIANS OF GREATER NEW YORK LOCAL 802,

Petitioners,

v.

BEN CUTLER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION*

Opinions Below.

The opinion of the Court of Appeals for the Second Circuit (dated April 30, 1963) is reported at 316 F. 2d 546 and is reprinted in Appendix A of the Petition, pp. 1a-7a. The opinion (entered November 13, 1962) of the District Court for the Southern District of New York is reported at 211 F. Supp. 433 and is reprinted in Appendix B, pp. 7a-35a of the Petition. A related (see footnote No. 1, p. 4, Petition) opinion of the United States Court of Appeals (dated October 17, 1961) is reported at 295 F. 2d 484 and is reprinted in Appendix A, pp. 25-33 of this Brief.

* Throughout this Brief references to the Petition are indicated thus: P. p 9 or P. p 11a ¶6; references to Appendix to Appellants' Brief (blue cover) in the Second Circuit (Docket No. 27946) are indicated thus: 151b; and references to the "Stenographers Minutes" of the Trial in the District Court in 60 Civil 1169 and 60 Civil 4025, March 5-9, 1962, are indicated thus: S. M. 71. The latter references are based on P. p 9a (last ¶).

Statute and Union Regulations Involved.

This case involves §§2(3) and 302 of the Labor-Management Relations Act of 1947, as amended, (61 Stat. 136 *et seq.*, 29 U. S. C. 141 *et seq.*) reprinted in Appendix C, P. p 36a-41a. It also involves (a) Article 15 of the By-laws of Petitioner, American Federation of Musicians of the United States and Canada (hereinafter referred to as AFM), reprinted in Appendix B of this Brief; and (b) a "Standing Resolution" or By-law of Petitioner, Associated Musicians of Greater New York, Local 802, AFM, (hereinafter referred to as Local 802), reprinted in Appendix C of this Brief. Petitioners misrepresent these exactions (P. p 5-7 and *passim*); for that reason they were reprinted in full in Appendices B and C of this Brief. The "Form B" contract, prescribed by Petitioners and often mentioned in the Petition, is reprinted in Appendix D of this Brief.

Questions Presented.

1. Did the Court of Appeals with respect to Cutler violate Rule 52(c) of the Federal Rules of Civil Procedure or otherwise warrant the exercise of this Court's supervisory powers as Petitioners claim in unspecific language?

2. Did the Court of Appeals reject or disregard valid, uncontested and significant findings of the District Court concerning Cutler?

3. Did the Court of Appeals in ruling on Cutler's rights construe §302 of the Act in a manner (a) contrary to the intent of Congress; (b) destructive of the legitimate interest of Petitioners; or (c) inconsistent with Petitioners' freedom of association under the First Amendment?

4. Did Cutler's contracts of engagements with his clients give to those clients "right of control" over Cutler and his orchestra?

5. Were Cutler's employees "employed in an industry affecting commerce" within the meaning of §302 of the Act? (The complaint does *not* allege "that the performance of a single musical engagement is an 'industry affecting commerce,'" as Petition avers, p. 6)

Counterstatement of Case.

By stipulation of the parties (187b-188b), the decision below involves only the case of one orchestra-leader-employer: Respondent Ben Cutler (34a-35a).

A. *The complaint.* Cutler's complaint attacks two Union regulations as illegal (under §302, Labor-Management Relations Act of 1947, as amended, hereinafter called "the Act"); *viz.*:

1. Article 15 (Plaintiff's Exhibit 11, S. M. 113; Complaint ¶22 and Exhibit A, 7b, and Answer ¶14, 16b), reprinted in Appendix B of this Brief. It requires orchestra leaders like Cutler to add a 10% "traveling surcharge" to the "price of all MISCELLANEOUS and MISCELLANEOUS OUT-OF-TOWN ENGAGEMENTS" (as therein defined) and to pay this 10% *price addendum* to the AFM Local in whose jurisdiction the engagement was played; and

2. A "Standing Resolution" (Complaint ¶23, 7b and Answer ¶15, 16b), reprinted in Appendix C of this Brief. This imposes on all members, including orchestra-leaders-employers, a 1½% "Local Tax," for whose "collection and payment" *the orchestra leader* is made responsible. This tax is computed on the basis of the "scale price" for the services of orchestra members (including the orchestra-leader-employer) for each engagement.

B. *Cutler as Employer.* Cutler works predominantly in the single-engagement field (154b); on a few occasions he

has played steady engagements (S. M. 70-71; 182). "Purchasers" of music (the orchestra leader's "clients") rarely contact Cutler in the first instance. He constantly and normally solicits his own engagements by personal contacts, by advertisements and by telephone (196b-197b). His engagements are not "highly casual" (P. p 4). His orchestras play an average of about 6 engagements on each Saturday and about 500 engagements per year. His gross annual income averages about $190,000.00 per year. (Plaintiff's Exhibits 20, 20-A and 20-B; S. M. 158-161). More than 50 per cent of Cutler's gross income is derived from performances in States other than the State of New York. (Plaintiff's Exhibits 20, 20-A and 20-B, S. M. 158-161; Cutler's contracts for engagements 1959-1961) Cutler never serves as a sideman (employee musician), giving his full time to his profession as orchestra-leader-employer (S. M. 116; 79b; 196b; P. p 13a-15a). When he plays an instrument, he does so usually as a soloist, standing in front of his orchestra and leading it.

Since 1960, Cutler has not used the "Form B" contract required by Petitioners for the booking of engagements (S. M. 132-135; Plaintiff's Exhibits 13 and 14, S. M. pp. 135-137; Plaintiff's Exhibits 20, 20a and 20b, S. M. 159-164).

C. *Petitioners' exactions not "dues."* Prior to this litigation, Petitioners did not maintain a record of the names of its members in Cutler's (or any other leader's) orchestras, nor of payments of the "Local Tax" or 10% "Surcharge" to credit against such members' names as (alleged) "dues". Until this litigation, Petitioners never regarded such "Tax" and "Surcharge" as *dues*. (S. M. 502-503; 704-708). In computing withholding taxes, neither Cutler nor other leaders ever regarded the ten percent traveling surcharge as *wages* of sidemen. (S. M. pp. 247-248). His

sidemen never asked him for any portion of the traveling surcharge (S. M. p. 248). No intra-union charges were ever processed to penalties against Cutler (a Union member for 30 years) despite the fact that he never paid any part of this *price addendum* to his sidemen. (S. M. 169; 173-175; 214-217).

Since institution of this and related litigation, Petitioners have vacillated about the nomenclature and nature of the two "taxes" in question. In their Petition, they refer to them as "work taxes" (P. p 3, 4, 6, and 12), as "taxes" (p. 6) and as "work dues" (p. 18). Petitioners' answer and witnesses in 60 Civil 4025 uniformly referred to these "taxes" as "dues" (Answer ¶¶11 and 12). The only "dues" described in defendants' By-laws are those paid on a regular basis by all members: "The membership dues shall be $24.00 per annum, payable $6.00 quarterly in advance on January 1, April 1, July 1 and October 1 * * *." (By-laws, Local 802, p. 31, Section 6). Petitioners' officers were unable to cite any section of their organic law which denominated the "local tax" or the "traveling surcharge" as *dues*. (S. M. 502-503; 704-713). They were unable to cite any Union publication, prior to the litigation, which ever called these exactions "*dues*". Petitioners' financial reports, prior to the litigation, always distinguished between "dues" and "taxes", itemizing them separately. (S. M. 579; 703).

D. *The 10% surcharge imposed only on leaders.* The petition (P. p 5-6) falsely asserts that AFM By-laws require *every member* to pay a "work tax" of 10% of the "minimum scale." The record shows no such "tax" obligation on any Union members *except orchestra leaders* and there is no reference to "work tax" in Petitioners' organic law.

E. *The 10% surcharge not wages.* The Petition also falsely alleges: "The AFM By-laws provide that traveling

musicians be paid (by the purchaser of the music) at least 10% more that the minimum wages,"—as if the "surcharge" consituted a *wage* increase. No such provision is to be found in Petitioners' By-laws. (Appendix B) The record contradicts the quoted allegation. (S. M. 92-115; 168; 226-228; 263-274). The "purchaser of music" is not a member of Petitioners; and Petitioners lack power to require *non-members*, like such purchasers, to pay wage increases to orchestra musicians. Moreover, Cutler's testimony on this point remains uncontradicted on the record: "But in the single engagement field * * * this 10% is not part of his [the sideman's] wages in my opinion and in the opinion of all the other leaders in New York City, and that is why none of them turn this money over to the sideman." (S. M. 215-216).

F. *Petitioners do not bargain with leader-employers.* Cutler is clearly an employer (195b-198b). Petitioners never contradicted the Trial Court's Findings in this respect. No evidence contraverts Cutler as to his own employer status. The U. S. Court of Claims in *Cutler* v. *United States*, 180 F. Supp. 360, found, on a careful review of the facts, that Cutler was an employer. Petitioners admit that, "as a matter of policy," they never bargained collectively with Cutler (or any orchestra leader) in the single-engagement field (which includes about 90% of musical services in this country). See P. p 11a ¶6 and p 6a, footnote 7.

G. *Leader pays both union exactions out of own funds.* The Court of Appeals is accurate in finding that "the leader is not really collecting the tax and the surcharge from the sidemen at all." P. p 6a. In paying *traveling surcharges*, Cutler paid "out of his own share." The *price* addendum constituted by the *"traveling surcharge"* was never *deducted* from the wages of his sidemen by Cutler.

It was *added* to the minimum (Union) *price* of the engagement paid by his client. Likewise, Cutler paid Local 802 *taxes* (Appendix C) "out of his own share" in two ways: (i) He paid a 1½% "local tax" *on his own minimum profit* ("leader's money" as unilaterally fixed by Local 802) from the engagement. This minimum profit *for the leader* according to the record (S. M. 107-108; 176) and according to Local 802's unilateral regulations ("Price Lists") is admittedly two-times the minimum wage fixed by Local 802 *for the sideman.* (ii) Cutler paid the "local tax" on the basis of 1½% of the *minimum wages* he paid to his sidemen. (*Those minimum wages are unilaterally* (i.e. without collective bargaining of any kind) *imposed by Local 802 under Union regulations* which, as a coerced member, he must obey; since *Petitioners, as a matter of avowed policy, do not bargain with orchestra-leader-employers or other members.* P. p 11a ¶6). The fund of money out of which Cutler paid *wages* to his sidemen is the same as the fund of money out of which he paid his own and his sidemen's "local tax." Its source is the moneys (the total *price*) paid to Cutler by his clients. That fund belonged to Cutler until he alienated it by drawing his checks for the "*local taxes*" payable to the Union and his checks for the *wages* payable to his sidemen. Most of the time Cutler deducted the amount of the "*local taxes*", which he paid *on behalf of his employees,* from the wages he paid to sidemen. Neither Cutler nor Petitioners ever obtained from sidemen any wage-deduction authorizations (199b and 200b) to authorize those deductions. Since the litigation, Cutler has refused to make these deductions.

Thus, "It is clear [as the Court of Appeals found] that the *10 percent surcharge* is an exaction *from the leader's* [*Cutler's*] *share.* The amount is never *deducted from the sideman's wages.*" (P. p 6a, emphasis added) It was

added to the minimum "price of the engagement" as prescribed by the AFM Local involved. Upon its collection from the client, this price addendum (as part of the total price) immediately became part of Cutler's own funds. (Appendix B)

The record wholly supports the Court of Appeals' statement in respect of the "traveling surcharge": "The leader [Cutler] is here required to pay further exactions entirely different from that of other union members." (P. p 7a) Sidemen were never required to pay the 10% *price addendum* established by Article 15 (Appendix B), which specifically says that the 10% price addendum must be collected "from orchestra leaders playing engagements." No provision in Petitioners' By-laws authorizes either collection thereof from *sidemen* or penalizing *sidemen* who fail to pay the "traveling surcharge." Petitioners' By-laws only provide penalties for *orchestra leaders* who fail to pay the "surcharge." The AFM never, before this litigation, kept any record of the sideman's alleged "union obligation" in this respect. (S. M. 847) No AFM records ever credited *sidemen* with payments of such "obligations." Cutler's sidemen never included any part of the "surcharge" as *income* under income tax laws. (S. M. 247-248)

H. *No basic conflict between decisions below.* The District Court's Findings are not in any significant respect contradicted by the Court of Appeals decision. The District Court did *not* find "that the Local 802 tax *and the traveling surcharge* are imposed on the sideman's earnings, *that the amounts are in fact deducted from the sideman's wages,* and * * * that the leader is collecting and paying the *sideman's union obligations.*" (P. p 10, emphasis added) On the stand, Petitioners' officers were unable to refer to any section of Union By-laws which imposed this alleged "union obligation" *upon sidemen.* (S. M. 502, 520, 593,

618-619, 717, 718) The "traveling surcharge" is never imposed upon the *sideman's earnings*. Rather it is "added to the *price* of all Traveling and Miscellaneous out-of-town Engagements." (Appendix B, Section 3, emphasis added). The wage checks payable to sidemen were computed by Cutler without reference to the 10% "traveling surcharge". Nothing was ever *deducted* from sidemen's wages under any Union "traveling surcharge" regulations. (Article 15, AFM By-laws, Appendix B). Petitioners' witness, Arons, denied such deduction: Q. Isn't it true, Mr. Arons, that the 10% traveling surcharge is an addendum to the price charged by the orchestra leaders to his client? A. That is true. (S. M. 508)

I. *Trial Court's minor misconceptions corrected by Second Circuit.* The Trial Court did make (in one relatively insignificant respect) an enigmatic and self-contradictory Finding: that "Federation members who perform a 'miscellaneous, out-of-town engagement' *are paid, but do not actually receive, in addition to their wages*, an amount equal to 10% of the minimum wage established by the local" (198b, ¶17, emphasis added). The Trial Court was there misled by Petitioners' briefs into contradiction of record evidence. In any event, this Finding is a long way from holding what Petitioners say it holds: that the surcharge "money came from the earnings of all the performers." (P. p 14; see also 198b, ¶18) How can someone be *paid but not receive* a wage increase? The District Court was obviously in error (an error which the Court of Appeals properly avoided) in reading Article 15 as requiring *payment to traveling sidemen of a wage "addition"* in an amount equal to 10% of sidemen's minimum wages. (P. p 12, footnote 7; ¶17, and Appendix B) Article 15 of

the AFM By-laws contains *no provision requiring payment* of the 10% traveling surcharge to sidemen. In fact, Cutler never did pay any part of the surcharge to his sidemen. Article 15 simply fixes the surcharge at 10% of the "*price* of * * * ENGAGEMENTS," (Section 3, Appendix B and Section 16). Furthermore the "surcharge" is not calculated merely on the *sideman's minimum wage,* as the Trial Court implies. It was also calculated on the *orchestra-leader-employer's minimum profit* or "leader's money". (S. M. 107-108; 114-115; 167-172).

The Trial Court somewhat improperly found "that the [1½%] local tax is to be payable and collected from all members * * * on all engagements based on the scale price therefor * * * and the orchestra leader * * * is responsible for *collecting and transmitting* the 'local tax'" (200b). The "Standing Resolution" says *twice* (p 40, *infra*) that the *orchestra leader* is responsible for the "collection *and payment*" of the "local tax" of 1½ per cent, (Appendix C). Under Petitioners' By-laws, the orchestra leader is responsible for the wages of his sidemen even when the client does not pay for the engagement. In such cases, the entire "local tax" comes out of the orchestra leader's pocket.

ARGUMENT.

(Reasons for Rejecting the Writ)

I. THE ISSUES ARE NOT NOVEL. Was Cutler an employer? Was he and were his employees in an industry affecting commerce? Were the union exactions listed within the exceptions included in §302(c) of the Act? These are commonplace and well settled issues of a type often raised under the Taft-Hartley Act. (No issue here concerns the "Form B" contract, despite contrary language

in the Petition, since Cutler had not used that form since 1960.) (S. M. 134-137; 172) Certiorari was not intended to provide litigants with just one more opportunity for argument.

II. No Conflict Between Courts. The decision of the Court of Appeals for the Second Circuit is not in direct or even indirect conflict with the decision of any other Court of Appeals on the same matter. There is no conflict with applicable State law. No such conflicts are alleged by Petitioners. No important question of federal law is involved which has not been, but which should be, settled by this Court. No conflict with applicable decisions of this Court exists or has been alleged by Petitioners. They have not even cited an alleged conflict based upon differences between general principles or reasonings developed in two different decisions. Nor have they alleged so much as inconsistency in *dicta* found in different decisions. Were there such conflict, the issue here is not of such importance as to warrant a writ. No showing of the need to define a national, uniform rule was or can be made, since only the AFM and its Locals are out of step with the statute and with all other unions in the country; and the rule below is clearly consonant with the national rule defined by Congress. Petitioners' theory of criticism of the decision below would introduce a new rule in direct conflict with decisions of this Court and with decisions of Courts of Appeals in other Circuits. *Sheet Metal Contractors Assn.* v. *Sheet Metal Workers International Assn.* (CA 9) 248 F. 2d 307; *U. S.* v. *Pecora* (CA 3) 267 F. 2d 512; *U. S.* v. *Ryan*, 350 U. S. 299; *U. S.* v. *Gibas* (CA 7) 300 F. 2d 836; *Arroyo* v. *United States*, 359 U. S. 419.

III. The Issues Are Not of National Importance. Only one orchestra-leader-employer is involved, despite Peti-

tioners' frequent lapses into langauge suggesting that the appeal below concerned class-action issues. (P. p 4-5) Whether Cutler is an employer and whether his employees are in an industry affecting commerce are scarcely questions of national importance. Whether Petitioners' exactions are "dues", or not, is not particularly significant since, even if they are, it is admitted by Petitioners that no dues deduction authorizations were signed by Cutler's sidemen. Even if "the vast majority of leaders are not employers" (P. p 14), the record shows without contradiction that Cutler is an employer. (P. p 13a-15a) Were Cutler the only employer in the Union, Petitioners' reasoning would still not be valid.

IV. No Class Action is Involved. Neither technically nor substantially is a class action here involved. The class action asserted in the complaint was dismissed by the District Court (P. p 32a "2); and no appeal was taken by plaintiffs below from that dismissal. Therefore, the ruling here challenged by Petitioners is in no sense a class ruling. Upon it depend no plans, hopes and aspirations of many people, because, by stipulation of the parties only one orchestra leader's case is involved. No question of scope or import under the Constitution, laws or treaties is raised. The impact of the rule under review is narrowly confined. It is not apt to have continuing future consequence, because the offending By-laws have been repealed effective January 1, 1964. (P. p 5, footnote) The issue here is of interest or importance only to the immediate parties. It does not qualify for *certiorari*. The decisions of the Courts below turn solely upon an analysis of the peculiar facts involved and upon a particular contract (Form B), which is not used by other unions nor by Cutler. *Bartels* v. *Birmingham*, 332 U. S. 126.

V. The Decisions Below Involve No Impact on the Operations of Other Labor Unions. No labor unions except AFM Locals use the Form B contract. No other labor unions: (a) systematically refuse to deal with employers or to sign labor contracts with them [P. p 11a ¶6]; (b) insist on regarding *employers* as *employees* by virtue of a bare, colorable contract [P. p 5]; (c) try to make the bizarre distinction between *employer*-members *acting as employers* and *employer*-members *acting as unionists* [P. p 18]; (d) systematically violate §302 of the Act [P. p 5, footnote]; (e) refuse to obtain wage deduction authorizations where they claim "dues" on check-off [P. p 17 ¶24 and p 16a ¶20]; and (f) continued so deliberately, so long and so repeatedly to disregard five court decisions reemphasizing the mandate of a federal statute with civil and criminal sanctions [P. p 5, footnote].

VI. The Question Will Soon Become Moot. Petitioners admittedly (P. p 5, footnote) have amended their Bylaws effective not immediately but on January 1, 1964, in an effort to eliminate the "work taxes",—*i. e.*, the very exactions which Cutler attacks and which the Courts below condemned. Meanwhile (and until January 1, 1964) they continue to violate the statute without changing what they call their "method of collection".

VII. Petitioners Claim (P. p 6) that the Complaint Attacked Only Their "Method of Collection". As a consequence, they contend repeatedly that the decisions below, granting relief as requested in the Complaint, affected only their "method of collection". They can easily and lawfully change that method without bothering the Supreme Court of the United States. Indeed, effective January 1, 1964, they claim to have done so already, by amending their own Bylaws. (P. p 5, footnote).

VIII. Obedience to the Statute Presents No Particular Difficulty to Other Unions. Why Should It Be Difficult for Petitioners? Even on Respondent's contention that the exactions are not "membership dues", there is nothing to prevent Petitioners (in their quest for union income) from enacting (as other unions do) a *lawful dues system* and then obtaining from sidemen-employees proper dues-deduction authorizations, with which they could approach orchestra leaders like Cutler for the purpose of collectively bargaining check-off and other agreements. On Petitioners' contention that the exactions are "dues", Petitioners should negotiate check-off agreements, as other unions do. All other unions have long since adjusted to the Act and Petitioners can easily, if belatedly, imitate them. Petitioners can avoid violation of the Act (and of criminal responsibility under it) by refraining, as all other unions do, from collecting from *employers* like Cutler any exaction not within the exceptions listed in §302(c) of the Act.

IX. Petitioners Ask This Court to Adjust an Alleged Conflict Between the Courts Below Respecting Relatively Important Findings of Fact. In effect, Petitioners assert a conflict between a decision of the Court of Appeals and a decision of the United States District Court for the Southern District of New York as basis for certiorari. Such a conflict does not, in fact, exist in respect of any matter of basic fact or law. Even if it did exist, it would not support the Petition. All findings of substantial fact made by the District Court received the concurrence of the Court of Appeals. The Supreme Court of the United States is not a court for correction of errors in fact-finding. *United States* v. *Johnston*, 268 U. S. 220, 227. It does not undertake to review concurrent findings of significant fact by two courts below in the absence of very obvious and exceptional showing of error. *Graver Manufacturing Co.* v. *Linde*, 336 U. S.

271, 275. No such showing was or can be made. Ample evidence supports the accurate reading of the record made by the Court of Appeals. Most of that evidence is uncontroverted. The evidence would have supported a jury verdict for the plaintiff.

X. The Statutory Interpretation on Which the Decisions Below Were Predicated Was Not Destructive of Legitimate Interests of Labor Organizations. Only AFM Unions are involved in the Cutler case. No other union presumes to "tax" *employers* without deigning to bargain with them. No other union is even remotely affected by this case. No other union coerces employers into union membership and then refuses to bargain with them precisely because of their union membership. No other union compels *employers* to become members and then taxes them *as union members* in a manner which Petitioners admit would be unlawful if the tax were levied on *employers qua employers* (P. p 14). Petitioners say the decision below is "grossly destructive of the legitimate interests of labor organizations"; as if other unions do what Petitioners did here. Petitioners do not list the "legitimate interests" which are being destroyed. Section 302 has been in operation since 1947; and unions in general have not significantly suffered in their legitimate interests.

XI. The Interest of Unions to Enlist Employers Like Cutler as Distinguished from Self-Employed Peddlers. Petitioners rely on an alleged "commonplace" to the effect that "working employers are in economic competition with ordinary workers" (P. p 18-19). Thus they seek comfort from this Court's statement in *Los Angeles Meat Drivers Union* v. *United States*, 371 U. S. 94, 103, that unions "often have a legitimate interest in soliciting self-employed entrepreneurs as members" (P. p 19). The short answer is that Cutler is *not* a "self-

employed entrepreneur" in the sense of the decisions cited in the Petition (P. p 19). Cutler employs many employees regularly. The self-employed persons in those cases employed no one. The work Cutler does in conducting his orchestra (even when he plays an instrument as soloist while conducting) is vastly different from the sidemen's work. Leading an orchestra is not the same as playing an instrument therein, even when the leader (like Cutler) plays an instrument. He does not remain just an instrumentalist when he plays as soloist while leading his orchestra, standing before his men. In *Los Angeles Meat Drivers Union*, the *employee* "grease peddlers" did exactly what the *self-employed* "grease peddlers" did. The same is true of the other cases cited in the Petition (p. 19). None of the "self-employed entrepreneurs" in those cases regularly employed dozens of employees each week, as Cutler does. "The average is six or seven men on each engagement." (S. M. 74) Sometimes 30 men play one engagement. It reaches far into the absurd to put an orchestra leader of Cutler's reputation and vogue in the same employer-status as self-employed peddlers. Besides, in all of the cited cases, the unions involved engaged in collective bargaining and signed labor contracts covering "self-employed entrepreneurs". Petitioners never do that. In any event, this Court recognized in *Los Angeles Meat Drivers* that unions *may not*, in certain cases, admit (or coerce as in Cutler's case) self-employed persons into membership. Where, as here, employers join with unions in fixing prices, the combination is forbidden without infringement of Constitutional freedom of association. The only competition permitted by Petitioners to an orchestra-leader-employer like Cutler is competition for engagements at prices *at or above the minimum prices of engagements* prescribed by Petitioners'

"Price Lists". Petitioners, in cooperation with orchestra-leader-employers who are subservient to them, forbid all competition for engagements between orchestra leaders at *prices below* the minimums set in their Price Lists. Thus, Petitioners have no legitimate interest in having members like Cutler, whose very union membership constitutes a combination in violation of antitrust laws. *Allen-Bradley Co.* v. *Local 3, I. B. E. W.*, 325 U. S. 797.

XII. The Decision Below Is Clearly Correct. The ruling of the Court of Appeals is *correct* legally, and it is *just* as a matter of equity. Petitioners misread the decision for which they seek review by saying that the "essence of the holding of the Second Circuit is that a *special* tax levied *only* against employer-members is prohibited by Section 302" (P. p 14). The Second Circuit simply held "that the Unions' demand for the 1½ percent wage tax and the 10 percent surcharge payment violates §302" (P. p 7a). The Second Circuit's decision was *not* contrary to the record nor contrary to express and uncontested basic findings of the District Court. Petitioners predicate their contentions to the contrary on the District Court's Findings numbered 17, 18, 19, 23 and 25, quoted in full as a footnote, P. p 12-13. The District Court concluded to the illegality of Petitioners' exactions from Cutler after it had made the very findings (among many others) to which Petitioners call attention in their footnote. The Court of Appeals found the same illegality; and, with respect to Petitioners' quixotic "construction of §302, reached the same result" (P. p 8). At this point Petitioners' argument becomes somewhat involved and very "iffy". Petitioners contend (i) that the Court of Appeals erroneously assumed five findings of fact, which are set forth in paragraphs (a) through (e) *infra;* (ii) that these five *assumptions* of the Court of Appeals are directly contradicted by the Findings of the District Court; and

(iii) that, *if* the Court of Appeals had not made these *assumptions* and *if* the Court of Appeals had concurred with the District Court's Findings, then the Second Circuit's decision would never have concluded that Petitioners had violated Section 302.

The fact is that the five so-called "assumptions" of the Court of Appeals are all *facts* which are well established in the record; and that the District Court at no time directly contradicted these facts:

(a) That the "taxes on the sidemen's work" were *not* due "from the sidemen themselves" and were *not* "payable out of their own earnings" (P. p 12-13 and 6a). [This proposition is established in the record by Petitioners' By-Laws (Appendices B and C), and by Petitioners' theory and practice (Counterstatement, pp 6-8, *supra*) before the exigencies of this litigation prompted Petitioners to invent a new theory.]

(b) That Cutler, the employer-member, was "not merely performing a *ministerial task* for the union" in transmitting to Petitioners the "taxes" involved. (P. p 13 and 6a) [In denying this proposition, Petitioners do what they falsely accuse the Court of Appeals of doing: "premising * * * critical factual assumptions", (P. p 11) directly contrary to the record evidence. The Trial Court nowhere found that Cutler's payment of the unlawful exactions was a "ministerial task". These words first came into this litigation by way of the Second Circuit's decision of April 30, 1963. (P. p 6a). Petitioners also neglect that portion of the exaction demanded by them from Cutler, which was *his personal "tax"*, computed respectively on 10% and 1½% of his "leaders' money". This, indisputably, "came out of his share" and was disbursed out of his pocket.]

(c) That *"the leader is not really collecting the tax and surcharge from the sidemen at all; he is*

actually paying the Union out of his own share." (P. p 9) [This proposition is established as a fact in the record by the Counterstatement, *supra,* Section G., pp 6-8]

(d) That "*The 10 percent surcharge is an exaction from the leader's share. The amount is never deducted from the sidemen's wages.*" (P. p 9) [This factual proposition, too, is established in the Counterstatement, *supra,* Section G., pp 6-8]

(e) That "*The leader is here required to pay further exactions on a basis entirely different from that of other union members.*" (P. p 9-10) [Only the leader pays the "surcharge" or 10% addition to the price of the engagement. No sideman could make or demand such a charge from the leader's client. As to the "local tax", admittedly the Local 802 rule is that the leader pays twice as much as the sideman.]

Neither the record nor the Trial Court's Findings support Petitioners' "iffy" speculations respecting these five valid propositions derived from the record by the Court of Appeals. Not one of the above five propositions is directly contradicted by any finding made by the Trial Court; despite petitioners' specious pretense that certain District Court findings (reproduced in P. p 12-13; footnote) were repugnant to what the Court of Appeals saw in the record. But assuming, *arguendo,* the factual accuracy of Petitioners' contradictory views on propositions, (a) through (e), *supra,* Cutler's case is unaffected; and the Second Circuit's ruling is not invalidated; because Petitioners conveniently neglect the fact (also found by both Courts below) that these exactions were paid by Cutler and demanded by Petitioners without wage deduction authorizations signed by Cutler's employees, as required by §302(c) of the Act.

XIII. The Decision Below Did Not Misconstrue §302 of the Act. Petitioners argue that the Courts below misconstrued §302 of the Act by failing to recognize that "fulfillment by union members [even when they are, like Cutler, *employers*] of obligations imposed on them solely as members", renders the employer's and unions' acts of respectively paying and receiving the exactions *lawful*. Petitioners do not want §302 construed "so as to prevent employers, * * * lawfully members of the union, from meeting obligations equally required of non-employer members" (P. p 14). Under this argument, union By-laws can repeal a Congressional enactment, and *union* "obligations" displace *statutory* obligations. Refutation is implicit in the very statement. The Court below correctly rejected the argument "that the leader's [Cutler's] membership in the Union immunizes him from the limitations which Section 302 imposes on him because of his being an employer" (P. p 6a). *United States* v. *Ryan*, 350 U. S. 299; *Arroyo* v. *United States*, 359 U. S. 419.

XIV. Congress' Legislative Intent Was Not Violated by the Interpretation of §302 Made Below. Petitioners argue that the Courts below interpreted the section "in a manner * * * contrary to the intent of Congress". The "*Legislative History of the Labor-Management Relations Act*, 1947." (P. p 22) recalls that what inspired Congress to pass the Section was (a) the "tax" imposed by the United Mine Workers for the purpose of instituting, *as a result of a collective bargaining*, the U. M. W. Welfare Fund (pp 1310-1311; 1305-1306); and (b) the AFM tax (designed by James Caesar Petrillo, then AFM President) on records (p 1312), *also resulting from collective bargaining*. Petitioners cite *Arroyo* v. *United States*, 359 U. S. 419, 424-425, wherein this Court states that §302 was

designed "to deal with problems peculiar to collective bargaining." It was aimed "at practices which Congress considered inimical to the integrity of the collective bargaining process." Petitioners conclude: "The collection and transmittal of union work taxes by a *union member* [who is also an *employer*] can hardly be considered inimical to the integrity of the collective bargaining process * * *". The short answer is that collection of exactions by a union which (like Petitioners) systematically and admittedly rejects the collective bargaining process (P. p 11a ¶6) is clearly inimical to that process. Congress *did* regard collection and payment (by *employers* to *unions*) of "work taxes", not included in the exceptions listed in §302(c), as inimical to the integrity of collective bargaining. In any event, Petitioners, who "as a matter of policy" refuse to bargain with orchestra-leader-employers like Cutler, are out of character in thus posing as protagonists of collective bargaining. Senators like Senator Claude Pepper opposed passage of §302, on the argument that *the section interferred with collective bargaining.* That is an argument which can only be made where there *is* collective bargaining. It could not logically be made here respecting the AFM and its Locals, which impose "taxes" unilaterally and *without collective bargaining* (P. p 11a, ¶6).

XV. Cutler is an Employer Under the Test of "Right of Control" and the Test of "Economic Reality". Whether the test of employer status be "economic reality" or "right of control" (P. p 22-23), Cutler is a genuine *employer.* (*Cutler* v. *United States*, 180 F. Supp. 360, and P. p 13a-15a.) Confused about the sometimes nebulous criteria which distinguish "employees" from "independent contractors" in some cases under the law of Agency and under the Act, Petitioners seem to find difficulty in distin-

guishing an obvious employer like Cutler from a sideman and from self-employed grease peddlers. The "*Legislative History of the Labor-Management Relations Act,* 1947", does not (as Petitioners allege, P. p 22-23) show that Congress repudiated, for the purposes of the Act, the "economic reality" test. (*E.g.*, a plant owner may not give the "right of control" over his employees to his wife by a bare contract and then assert to the NLRB that he is *not* the employer under the Act, even though he *is* the employer by the test of "economic reality".) Cutler is an employer by both tests on undisputed evidence. The Court of Appeals described Petitioners' "Form B" contract (Appendix D) correctly and accurately as "a self-serving subterfuge which is not entitled to any weight" (P. p 5a). But, even if, *arguendo*, this descriptive dictum be erroneous, that leaves Cutler's case unscathed, since *he does not use the Form B Contract.* Appendix D shows that even if he did, there would be no derogation from his status as employer.

XVI. Rule 52(a) F. R. C. P. was not Violated. "Finding of Fact" #17 was clearly and on its face erroneous. A Court of Appeals is not required by the Rule to adhere to an erroneous finding of fact. Moreover, "Finding of Fact" #17 is really a *conclusion of law.* It is therefore not protected by Rule 52(a). *Hummel Brothers Co.* v. *Serrick Corp.*, (CCA 7, 1941) 122 F. 2d 740. This "Finding" or conclusion is not basic. The structure of the Court of Appeals' reasoning survives total demolition or partial elimination of that Finding or conclusion. Petitioners' suggestion that the Court below, by disregarding Finding #17, transmuted the whole "theory of statutory violation underlying the injunction" (P. p 14-15) and raised "a serious question of constitutional due process"

is too patently false to need comment. It simply does not matter "that the transmittal is performed solely as a union obligation" (P. p 14). A higher statutory obligation overrides the "union obligation".

XVII. If Petitioners Really Believe that the Involved Exactions are "Membership Dues", Why Have They Failed to Obtain Wage Deduction Authorizations? Were Petitioners' contention that the exactions here are "membership dues" valid, Petitioners can readily avoid violation of statute simply by obtaining and using dues deduction authorizations under a labor contract providing for dues-check-offs (§302(c) of the Act).

XVIII. The N. L. R. B. Decisions Cited by Petitioners do not Justify the Form B Contract; and in any Event that Form is Irrelevant Here. The N. L. R. B. has not held "that by virtue of the Form B contract the purchaser of the music is the employer." (P. p 22; the four cases there cited by Petitioners hold no such thing: Three of the four do not even involve the Form B contract nor an AFM union.) *Respondent does not use that form.* The Petition asserts: "Respondent as leader used the Standard Form B Contract" (P. p 21), as if to intimate recent use. The uncontradicted evidence is that Cutler has not used that form since 1960 (S. M. 134-137; 172). The Form B Contract and its analysis appear in Appendix D of this Brief. Petitioners complain that the Trial Court "did not discuss the applicability of the Form B Contract" (P. p 7). Since Cutler did not use the "Form B Contract", there was no reason for the Trial Court to discuss it in this (the Cutler) case.

XIX. There is no Basis for Exercise of this Court's Supervisory Powers. Petitioners seem to argue (Petition, p 14) as if the Trial Court had found that "the money

[for the exactions paid by Cutler and demanded of him by Petitioners] came from the earnings of all the performers". The Trial Court did no such thing. Nor would it have changed the result below if the Trial Court had in fact made such a finding, in view of the absence of wage deduction authorizations. Only because the Court of Appeals *assumed*, say Petitioners, a finding by the District Court that the money came *out of the employer's pocket*, was the Court of Appeals able to affirm the District Court's judgment. *If the Court of Appeals had agreed with the District Court on the facts, the Court of Appeals would have disagreed with the District Court on the law.* So runs Petitioners' argument! As the Counterstatement shows (pp 6-10, *supra*), *the money did come out of the employer's (Cutler's) pocket.* Whether the exactions came from his sidemen or from Cutler himself or from both, Petitioners wanted them paid in violation of the clear prescriptions of §302 of the Act. If the money used by Cutler to pay the exactions constituted, *arguendo*, *wage deductions*, Cutler still had no right to make such deductions without (a) wage deduction authorizations signed by his employees and (b) a check-off agreement between Cutler and the Union representing his employees.

XX. First Amendment Freedom of Association is not here Involved. As a reason for granting the Writ, Petitioners urge that §302 has been construed below "in a manner * * * inconsistent with * * * freedom of association * * * ". Just how this freedom is jeopardized Petitioners do not specify. They contend "that, properly interpreted, §302 prohibits payments only when the employer [Cutler] acts *qua* employer, not when he acts as a union member"! Petitioners give Cutler two hats—one as a *union member* and one as an *employer*—and they admit

that Cutler violates §302 if he pays their exactions while wearing the *employer hat;* but not if he pays the *same exaction* while wearing the *union-member hat!* (Such a ludicrous theory of statutory construction belongs in plays like "*The Mikado.*") Then they say that a law or ruling forbidding Cutler from wearing these two bonnets abridges freedom of association!

Conclusion.

The petition for certiorari should be denied with costs.

Respectfully submitted,

GODFREY P. SCHMIDT,
Counsel for Respondent,
60 East 42nd Street,
New York 17, N. Y.

Dated: October 14, 1963.

Appendix A.

Opinion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 108-111—September Term, 1961.

(Argued September 28, 1961 Decided October 17, 1961.)

Docket Nos. 27013-16.

JOSEPH CARROLL, CHARLES PETERSON and CHARLES TURECAMO, as Treasurer, Orchestra Leaders of Greater New York,

Plaintiffs-Appellants,

—v.—

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, HERMAN D. KENIN, as President of said FEDERATION, STANLEY BALLARD, as Secretary of said FEDERATION, and GEORGE V. CLANCY, as Treasurer of said FEDERATION, ASSOCIATED MUSICIANS OF GREATER NEW YORK, LOCAL 802, and AL MANUTI, as President of LOCAL 802, MAX L. ARONS, as Secretary of LOCAL 802, and HY JAFFE, as Treasurer of LOCAL 802,

Defendants-Appellees.

Before:

LUMBARD, *Chief Judge*,
FRIENDLY and SMITH, *Circuit Judges*.

Plaintiffs appeal from the denial by the District Court for the Southern District of New York, Edmund L.

Palmieri, *J.*, of a temporary injunction to restrain certain practices of musicians' unions and their officers. Reversed to extent indicated, otherwise affirmed.

GODFREY P. SCHMIDT, New York, New York, *for Plaintiffs-Appellants.*

DAVID I. ASHE (Ashe & Rifkin), New York, New York, *for Defendants-Appellees.*

FRIENDLY, *Circuit Judge*:

Plaintiffs are orchestra leaders and members of an unincorporated association known as Orchestra Leaders of Greater New York; they also are members of defendant American Federation of Musicians of the United States and Canada, an international union, and of the New York local, defendant Associated Musicians of Greater New York, Local 802, as, allegedly, union rules require them to be. The business of plaintiffs and the other orchestra leaders they claim to represent is the "single engagement" field. This consists of single performances on occasions such as weddings, college or high school dances, business conventions, club entertainments and the like, in contrast to the "steady engagement" field where musicians are hired on a long-term basis by employers such as television stations, hotels, restaurants, night clubs, and opera or symphony associations. In the "single engagement" field, the person or organization desiring the performance solicits, or is solicited by, an orchestra leader; the latter in turn obtains the musicians, called sidemen, who are to assist in fulfilling the engagement.

Plaintiffs on behalf of themselves and other orchestra leaders have brought four actions against the defendant unions and the latter's officers in the Southern District of New York, which have now been consolidated for trial. One of these, *Carroll v. Associated Musicians of Greater New*

York, challenged a welfare fund promulgated by Local 802 as violating §302 of the Labor-Management Relations Act, 29 U. S. C. §186; a temporary injunction granted by Judge Dimock, 183 F. Supp. 636 (S. D. N. Y. 1960), was affirmed by this Court, 284 F. 2d 91 (2 Cir. 1960). Two actions attacked the unions' practices of establishing price lists and employment quotas as violating the antitrust laws; a motion for a preliminary injunction in one was denied by Judge Bryan in October, 1960, and a similar motion in the other was marked off for excessive adjournment in January, 1961. The fourth action challenged, under §302 of the Labor-Management Relations Act, a "tax," at one time 2% and later reduced to 1½%, which a by-law of Local 802 required leaders to deduct from amounts received for the services of members and pay to the Local, and a 10% "traveling surcharge," which Article 15 of the Constitution of the International required leaders to add to the price of engagements played by members outside the jurisdiction of their home local and pay to the International.

Plaintiffs' motion, dated March 21, 1961, which has given rise to the order here under review, was entitled in all four actions. It sought a temporary injunction against collection of the "tax" and the "traveling surcharge," and also against the defendants' visiting upon plaintiffs and other orchestra leaders "any economic or other reprisals (except expulsion from union membership or other purely intra-union penalty) because of their participation in the above-entitled actions or because of their failure to comply with the union laws and regulations whose legal validity is challenged in the complaints in the above-entitled actions; and from interfering, directly or indirectly, in any way whatsoever, with the business, employment, engagements, jobs or work opportunities of plaintiffs or the class they represent, and from precluding interrupting or interfering with the rights of plaintiffs or any of them to work as musicians in any place or upon any job or engagement whatsoever." Judge Palmieri denied the motion, holding that "Complex and weighty issues of law and of fact are pre-

sented in these suits and serious economic interests of both sides are at stake," that "The voluminous papers submitted on these motions emphasize the need for a thorough and careful appraisal of the facts by a trial court"; that "the injunctions sought by the plaintiffs would disrupt strongly entrenched practices and procedures of the defendants with consequent uncertainty as to work and compensation patterns affecting many thousands of members belonging to the defendant unions"; that if a trial should result unfavorably to the plaintiffs, "there would be no adequate way to repair the harm done or account for the wages and jobs that may have been lost"; and that "the immediate benefit that could accrue to the plaintiffs by the granting of threshold injunctive relief does not outweigh the corresponding detriment that would be suffered by defendants should plaintiffs fail to prove their claims." Plaintiffs appeal from this denial, 28 U. S. C. §1292(a)(1).

These reasons for refusing interlocutory relief that would interfere with the long-established system for establishing wage scales and employment quotas appear entirely sound. However, we are unable to find similar basis for refusing the injunction with respect to the "tax" or the "traveling surcharge" or to "reprisals" for failing to make such payments.

Section 302(a) of the Labor-Management Relations Act, as amended by §505 of the Labor-Management Reporting and Disclosure Act of 1959, makes it "unlawful for any employer • • • to pay, lend, or deliver, or to agree to pay, lend, or deliver, any money or other thing of value • • • to any representative of any of his employees who are employed in an industry affecting commerce," or "to any labor organization, or any officer or employee thereof" which represents any such employees. Although defendants deny that the orchestra leader is the "employer" of the sidemen and claim the father of the bride is the true employer, as indeed the contract form says, we think this contention, far from being serious or difficult, borders on the frivolous for reasons stated in another connection by

the Court of Claims in *Cutler v. United States*, 180 F. Supp. 360, 362 (1960),—an opinion followed by Judge Dimock in his decision in *Carroll v. Associated Musicians of Greater New York, supra*, which we affirmed. There is, of course, no denial that the defendant unions are representatives of employees and are labor organizations representing employees.

Hence the only remaining question with respect to the applicability of §302(a) to the tax and the surcharge is whether the "single engagement" field is "an industry affecting commerce." The verified complaints, incorporated by reference in the motion, alleged that plaintiffs and the class they represent "frequently fulfill single engagements outside of the State in which they usually operate and in which their principal offices are located" and that the revenues from such engagements run into millions of dollars a year. The answering affidavits did not challenge this but contented themselves with reliance on this Court's statement on the earlier appeal, 284 F. 2d at 92, that "The degree to which the sidemen employees of the leaders were 'employed in an industry affecting commerce' • • • is an issue which can be more satisfactorily resolved on a full trial of the case." Defendants argue that, just as limitations on the scope of review of interlocutory orders lay behind our affirmance of Judge Dimock's preliminary determination that he was sufficiently satisfied of an effect on commerce, the same limitations require affirmance of what they consider Judge Palmieri's preliminary determination that he was not. Apart from the seemingly capricious results to which this argument leads, it overlooks that the issue with respect to "commerce" in the action relating to the welfare fund was considerably more troublesome than here. What had concerned Judge Dimock and led to our remark as to resolution by a trial was that Local 802's welfare fund regulations applied only to engagements within New York City and Nassau and Suffolk Counties, in New York state, 183 F. Supp. at 638; there was thus a question whether activities of the industry crossing state lines could be considered. Here there is no such question.

The Local's by-law imposing the "tax" and the provision of the International's Constitution imposing the "traveling surcharge" are not limited to engagements within the state; indeed, the latter applies only to engagements outside the Local's own jurisdiction, many, if not most, of which would be outside the state of New York. The case with respect to interstate commerce is thus immeasurably stronger than that before Judge Dimock; and if we were preliminarily satisfied of an effect on commerce there, we must surely be so here. We hold that defendants have thus far failed to raise any substantial issue that these two impositions did not relate to "an industry affecting commerce," *United States* v. *Shubert*, 347 U. S. 222 (1955).

It follows that, on the showing before the District Judge, the tax and the surcharge violated §302(a)[1] unless they came within one of the exceptions of §302(c). The only exception in any wise pertinent is subsection (4) which permits an employer to deduct from wages money constituting "payment of membership dues in a labor organization: Provided, that the employer has received from each employee, on whose account such deductions are made, a written assignment * * *" From what we have before us it would seem indeed that the "tax" imposed by the Local's by-law may have constituted the payment of membership dues although not denominated as such; however, defendants did not bring themselves within the exception since there were no written authorizations. Normally the 10% "traveling surcharge" is divided by the International three ways: 4/10ths goes to the local in whose jurisdiction the engagement was played, 4/10ths is retained by the International, and 2/10ths is paid to the members who played the engagement. The distribution to the local and to the employees themselves would seem quite clearly not to constitute membership dues. We are unable to determine from the material before us whether the payment to the Inter-

[1] This is subject to possible qualification with respect to so much of the 10% "traveling surcharge" as ultimately went to the performers themselves, with the International acting only as a conduit, a question we find unnecessary to decide.

national would be such but in any event no written authorizations were furnished.

The general considerations marshalled by the District Judge against the grant of temporary injunctive relief, which we find persuasive with respect to the union provisions as to salary scales and employment quotas, do not appear pertinent to the collection of the apparently illegal "tax" and "surcharge"; doubtless the sheer mass of papers and argument tended to distract the judge's attention from this single aspect of the case. It is true that plaintiffs apparently suffer no out-of-pocket loss from the tax and the surcharge on the sidemen, since the tax is deducted from the musicians' salaries and the surcharge is added to the price to the customer; however, if plaintiffs are right as to the illegality of these payments, as they seem to be, their conduct renders them subject to §302(d), which makes them guilty of a misdemeanor carrying a fine of not more than $10,000, or imprisonment for not more than a year, or both. Defendants suggest that this sensitivity of the plaintiffs to criminal liability is somewhat recent; however, a court of equity ought not deny interlocutory relief to a person seeking its aid in terminating his criminal conduct simply because repentance has been late and may not have been motivated solely by respect for law. Neither will an injunction relating only to these payments entail the destructive consequences on employment feared by the District Judge; such detrimental effect as the injunction might otherwise have on the unions can be substantially cushioned by a provision, suggested by him and accepted by plaintiffs, that the amounts claimed by defendants to be collectible as "tax" and "surcharge" shall be paid into escrow, and by a further provision that the "tax" should continue to be paid directly to the Local to the extent that leaders are furnished with written authorizations complying with §302(c).

Since plaintiffs were entitled to an injunction against being required to pay the apparently illegal tax and traveling surcharge, they were likewise entitled to protection

against interference for failing to make such payments. They complain also of the denial of an injunction against reprisals for instituting and prosecuting the four actions. Appellees say there have been none for that cause, the only disciplinary action taken against plaintiffs and consequent threats to them having stemmed from nonpayment of the "tax" and "traveling surcharge" or other breaches of union regulations. Appellants' evidence does not negate this sufficiently to warrant us in reversing the denial of the broader injunction sought. An injunction limited to the payments and to reprisals for failure to make them, which should also direct appellees to retract any threats to musicians and prospective customers already made on that ground, is all that has been clearly shown to be required; if defendants should attempt reprisals against the plaintiffs for bringing or prosecuting the actions, a further application can be made and relief promptly given.

In holding that a temporary injunction should have issued to the extent indicated, we are not unmindful that, as Judge Sanborn stated a half century ago, it is "to the discretion of the trial court, not to that of the appellate court, that the law intrusted the granting or refusing of these injunctions, and the only question here is: Does the proof clearly establish an abuse of that discretion?" *Love v. Atchison, T. & S. F. Ry.*, 185 F. 321, 331 (8 Cir. 1911). However, that does not mean that denial of a temporary injunction is to be free from review. Congress would scarcely have gone to the pains of amending the Evarts Act, 26 Stat. 826, 828 (1891), which had provided interlocutory review over the grant or continuance of injunctions as an exception to the general requirement of finality, so as also to include their denial, 28 Stat. 666 (1895),[2] and then of repeating the process when it enacted §129 of the Judicial Code of 1911, 36 Stat. 1134, modifying 31 Stat. 660 (1900) in this respect, unless it had thought that mean-

[2] This was done because the implications of "the lack of all review over the action of a single judge in denying interlocutory injunctions," "had not been adequately considered." Frankfurter and Landis, The Business of the Supreme Court, 108-109.

ingful duties were being imposed upon the Courts of Appeals. Moreover, as said by Chief Judge Magruder, "'Abuse of discretion' is a phrase which sounds worse than it really is. All it need mean is that, when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *In re Josephson*, 218 F. 2d 174, 182 (1 Cir. 1954); see, to much the same effect, Judge Learned Hand in *Barnett* v. *Equitable Trust Co.*, 34 F. 2d 916, 920 (2 Cir. 1929). In *Ring* v. *Spina*, 148 F. 2d 647 (2 Cir. 1945), this Court reversed the denial of a temporary injunction founded on what the Court tentatively considered an erroneous view of the law; such a reversal occurred also in *Perry* v. *Perry*, 190 F. 2d 601 (D. C. Cir. 1951), where the denial below had been predicated on what the Court of Appeals regarded as an unduly restrictive interpretation of a contract. See also *National Grain Yeast Corp.* v. *City of Crystal Lake*, 147 F. 2d 711 (7 Cir. 1945); *Chicago, R. I. & P. R.R.* v. *Switchmen's Union*, 292 F. 2d 61, 71 (2 Cir. 1961). Such considerations and authorities suffice to support reversal of the order to the limited extent of directing issuance of a temporary injunction consistent with this opinion; the detailed framing of the injunction is properly left to the District Judge. In order to expedite the entry of such an injunction, the mandate will issue forthwith.

Appendix B.

Article 15—10% Traveling Surcharge.

SECTION 1. All engagements of one week or more played by members outside of the jurisdiction of their home Local and all tours of one week or more are considered TRAVELING ENGAGEMENTS.

NOTE—It is understood that a week shall consist of five, six or seven days.

SECTION 2. All engagements of less than one week played by members outside of the jurisdiction of their home Local are considered MISCELLANEOUS OUT-OF-TOWN ENGAGEMENTS.

SECTION 2-A. Any orchestra composed of members of more than one local shall be considered an orchestra playing a "Traveling" or "Miscellaneous out-of-town" engagement, and is hereby subject to the 10% Traveling Surcharge. The Surcharge applies even though the engagement takes place in the jurisdiction in which the leader is a member.

The 10% Traveling Surcharge shall NOT apply when engagement is exempt under provisions of Article 15, Section 3.

The 10% Traveling Surcharge shall NOT apply where permission is granted to a leader to use members of other locals under provisions of Article 12, Section 9.

SECTION 3. An additional 10% based on the price of the Local in whose jurisdiction the engagement is being played shall be added to the price of all TRAVELING and MISCELLANEOUS OUT-OF-TOWN ENGAGEMENTS. Exempt from this 10% additional charges are the following:

Symphony Orchestras.
Concert Orchestras.
Opera Engagements.
Traveling Theatrical Tours.
Theatre Engagements.

Rodeo and Circus Engagements.
Military, Concert or Brass Bands.
Radio and Television Engagements.

Picnic Engagements which originate in the jurisdiction of a Local that has no picnic grounds or where picnic grounds are not available and which shall be considered a Local engagement governed by the prices and conditions of home Local.

Political Tours of a candidate within the confines of his own state.

Fair and carnival engagements, excepting that part of these engagements which are played for dancing and to which the 10% surcharge shall apply.

SECTION 4. The 10% charge shall apply to arrangers and copyists who are not employed as instrumentalists, and also applies to conditions on the engagement, such as overtime, doubling on instruments, room and board allowance, etc.

SECTION 5. The 10% surcharge shall not apply to the Local's charge for wearing apparel and shall not apply to additional price list charges for and where members furnish electric organs or other specialized and expensive equipment.

SECTION 6. Wherever a steamer or pleasure boat remains on location at any dock for one week or more, and whenever the cruises of such steamer or pleasure boat are without destination, or whenever such steamer or pleasure boat is used for daily excursions returning the same day to the port in which it is located, then, even though during such excursion the steamer or pleasure boat touches more than one port, the members playing on such steamer or pleasure boat are governed by all the rules and regulations governing traveling orchestras, and the Local where the original port is located shall collect dues and the 10% surcharge.

SECTION 7. Locals must collect the additional 10% from orchestra leaders playing engagements in their jurisdictions that come under the 10% charge and shall immediately forward same to the International Treasurer, who shall make the following disbursements of said 10%:

Four-tenths to the Local in whose jurisdiction the engagement was played, except in case where no effort was made by the Local to collect.

Four-tenths to the Federation.

Two-tenths to the members who played the engagement.

SECTION 8. In case a Local fails to collect the 10%, the orchestra leader from whom it should have been collected is then obliged to send same direct to the International Treasurer.

SECTION 9. In cases where the Treasurer collects the 10% direct and the Local made efforts to collect same but failed and so advised the Treasurer, he shall then furnish the Local with a statement showing from whom the collection was made and, if possible, the names of the members of the orchestra and the total amount paid by the same.

SECTION 10. If a leader is found guilty of unlawfully retaining money that is returned to him by the Treasurer for transmission to members of the orchestra he shall be expelled.

SECTION 11. A traveling orchestra playing steady engagements, or a traveling orchestra on tour for one week or more, playing single engagements, must charge the price of the Local in whose jurisdiction they are playing, plus 10%. Exempt from this law are those engagements named in Article 15, Section 3, and any traveling steady engagement covered by a National scale.

SECTION 12. An orchestra playing miscellaneous out-of-town engagements in the jurisdiction of a Local which maintains the same price or a lower price than their own Local

must charge the price of their own Local plus 10% of the price of the Local in whose jurisdiction they are playing.

SECTION 13. An orchestra playing miscellaneous out-of-town engagements in the jurisdiction of a Local which maintains a higher price than their own Local, must charge the price of the Local in whose jurisdiction they are playing, plus 10% of the price of the Local wherein playing.

SECTION 14. An orchestra playing three or four engagements per week for continuous weeks in a jurisdiction of a Local other than their own must charge the price of the Local in whose jurisdiction they are playing, plus 10%.

SECTION 15. A leader who plays a traveling or miscellaneous out-of-town engagement or engagements, and fails to pay his ten per cent surcharge, shall be subject to a penalty of not more than $50.00 for each offense, which shall be in the discretion of the International Treasurer. After leader has been notified and has failed to pay the taxes owing plus the penalty he shall be considered as having resigned from the Federation, and the local to which he belongs is obliged on receipt of notice from the International Treasurer, to strike his name from its membership list. To become reinstated such resigned member must pay all arrearages in taxes and fines and in addition shall pay a National Reinstatement Fee or meet such conditions as the International Executive Board may determine.

SECTION 16. In all cases in which members of traveling orchestras authorize the International Treasurer to deduct the amount of the tax due from the 10% of the price of the engagement on deposit with him, the Treasurer shall have the authority at his own option to do so or insist that the tax be sent him when due.

SECTION 17. Prices to be paid to local members who augment traveling orchestras during time that such orchestras visit jurisdiction of their Local are governed by rules of

the Local except on such engagements for which the National law makes proviso that 10% in excess of the local price must be charged. In such cases the local members augmenting a traveling orchestra must receive the additional 10% of all charges as hereinafter provided.

SECTION 18. Every Local will be obliged to report to the International Treasurer every traveling orchestra or Local out-of-town orchestra playing in its jurisdiction, also whether traveling members' taxes are paid up to date. A Local is esponsible for its officers to investigate traveling orchestras, and in the event it fails to have the stipulations of this law carried out, it shall be fined Twenty-five ($25.00) Dollars in each individual case.

Appendix C.

Standing Resolutions.

Resolved, That effective as of October 1, 1943, until December 31, 1960:

(a) There shall be payable by and collected from all members a 1 per cent tax on all engagements based on scale price therefor;

(b) Said 1 per cent tax shall likewise be levied on all salaries paid to officers of our local and to all members thereof regularly employed by the Union;

(c) All income realized from items (a) and (b) above mentioned shall be allocated to the General Fund of our local.

Effective as of October 15, 1955, until December 31, 1960:

(a) There shall be payable by and collected from all members an additional 1 per cent tax on all engagements based on scale price therefor;

(b) Said additional 1 per cent tax shall likewise be levied on all salaries paid to officers and to all Local 802 members thereof regularly employed by the Union;

(c) All incomes realized from items (a) and (b) above-mentioned shall be allocated as follows:

1. ¼ (one-fourth) of 1 per cent to be set aside for the purpose of continuing the campaign for live music.

2. ¼ (one-fourth) of 1 per cent to be set aside for a strike fund.

3. ½ (one-half) of 1 per cent to be allocated to the General Fund of our local to take care of the rising costs of administering the affairs of Local 802.

(Note: On all engagements there is payable a total of 2 per cent tax until December 31, 1960.)

Effective as of January 1 1961: The 2% Tax payable on all engagements be reduced ½ of 1%. Therefore, on all engagements there is payable a total of 1½% tax to the General Fund. The leader shall be held responsible for the collection and payment of this tax.

There be no further specific allocation of ¼ of 1% to the Live Music Fund and no further specific allocation of ¼ of 1% to the Strike Fund.

(a) There shall be payable by and collected from all members a 1½ per cent tax on all engagements based on scale price, therefore: Leaders shall be held responsible for the collection and payment of this Tax.

(b) Said 1½ per cent tax shall likewise be levied on all salaries paid to officers of our local.

(c) All income realized from items (a) and (b) above-mentioned shall be allocated to the General Fund of our local.

Appendix D.

Form B Contract and Analysis.

(Plaintiffs' Exhibit 13, March 5, 1962, S. M. 134-135.)

(Opposite ☞)

SINGLE ENGAGEMENT

Contract Blank

Associated Musicians of Greater New York

LOCAL 802, AMERICAN FEDERATION OF MUSICIANS, NEW YORK 19, N. Y.

THIS CONTRACT for the personal services of musicians, made this _____ day of _____, 19____, between the undersigned employer (hereinafter called the "employer") and _____ musicians (hereinafter called "employees").
(Including the Leader)

WITNESSETH, That the employer hires the employees as musicians severally on the terms and conditions below. The leader represents that the employees already designated have agreed to be bound by said terms and conditions. Each employee yet to be chosen shall be so bound by said terms and conditions upon agreeing to accept his employment. Each employee may enforce this agreement. The employees severally agree to render collectively to the employer services as musicians in the orchestra under the leadership of _____ as follows:

Name and Address of Place of Engagement _____

Date of Employment _____ **Welfare** _____ Cartage _____

Type of Engagement _____ Name of Room _____

Hours of Employment _____ Doubling _____

_____ Mileage and Transp. _____

Price Agreed Upon: $_____ OVERTIME $_____ per hour or part thereof.

In the event there is a SHOW of more than 20 Minutes (Cumulative time) to be played, said SHOW must be played by the entire Orchestra, and there will be an additional charge of $_____ for playing of said SHOW, exclusive of Rehearsal time.

TOTAL PRICE AGREED UPON $_____

This price includes expenses agreed to be reimbursed by the employer in accordance with the attached schedule, or a schedule to be furnished the employer on or before the date of engagement.

To be paid _____
(Specify when payments are to be made)

Upon request by the American Federation of Musicians of the United States and Canada (herein called the "Federation") or the local in whose jurisdiction the employees shall perform hereunder, the employer either shall make advance payment hereunder or shall post an appropriate bond.

ADDITIONAL TERMS AND CONDITIONS

If any employees have not been chosen upon the signing of this contract, the leader shall, as agent for the employer and under his instructions, hire such persons and any replacements as are required for persons who for any reason do not perform any or all services. The employer shall at all times have complete control over the services of employees under this contract, and the leader shall, as agent of the employer, enforce disciplinary measures for just cause, and carry out instructions as to selections and manner of performance. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. On behalf of the employer the leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the leader includes the cost of transportation, which will be reported by the leader to the employer.

All employees covered by this agreement must be members in good standing of the Federation. However, if the employment provided for hereunder is subject to the Labor-Management Relations Act, 1947, all employees, who are members of the Federation when their employment commences hereunder, shall be continued in such employment only so long as they continue such membership in good standing. All other employees covered by this agreement, on or before the thirtieth day following the commencement of their employment, or the effective date of this agreement, whichever is later, shall become and continue to be members in good standing of the Federation. The provisions of this paragraph shall not become effective unless and until permitted by applicable law.

To the extent permitted by applicable law, nothing in this contract shall ever be construed so as to interfere with any duty owing by any employee hereunder to the Federation pursuant to its Constitution, By-laws, Rules, Regulations and Orders.

Any employees who are parties to or affected by this contract are free to cease service hereunder by reason of any strike, ban, unfair list order or requirement of the Federation, and shall be free to accept and engage in other employment of the same or similar character or otherwise, for other employers or persons without any restraint, hindrance, penalty, obligation or liability whatever, any other provisions of this contract to the contrary notwithstanding.

Representatives of the local in whose jurisdiction the employees shall perform hereunder shall have access to the place of performance (except to private residences) for the purpose of conferring with the employees.

The performances to be rendered pursuant to this agreement are not to be recorded, reproduced, or transmitted from the place of performance, in any manner or by any means whatever, in the absence of a specific written agreement between the employer and the Federation relating to and permitting such recording, reproduction or transmission.

The employer represents that there does not exist against him, in favor of any member of the Federation, any claim of any kind arising out of musical services rendered for any such employer. No employee will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. If the employer breaches this agreement, he shall pay the employees, in addition to damages, 6% interest thereon plus a reasonable attorney's fee.

The employer, in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amounts stated herein, and, if applicable to the services to be rendered hereunder, acknowledges his liability to provide workmen's compensation insurance and to pay social security and unemployment insurance taxes.

To the extent permitted by applicable law, there are incorporated into and made part of this agreement, as though fully set forth herein, all of the By-laws, Rules and Regulations of the Federation and of any local of the Federation in whose jurisdiction services are to be performed hereunder (insofar as they do not conflict with those of the Federation), and the employer acknowledges his responsibility to be fully acquainted, now and for the duration of this contract, with the contents thereof.

The undersigned, whether signing this contract as principal, agent or otherwise, in order to induce Local 802, A. F. of M., to approve this contract, personally undertakes to pay, and will be principally responsible for the payment of all sums required to be paid hereunder.

undersigned employer (hereinafter called the "employer") and _____ musicians (hereinafter called "employees").
(Including the Leader)

WITNESSETH, That the employer hires the employees as musicians severally on the terms and conditions below. The leader represents that the employees already designated have agreed to be bound by said terms and conditions. Each employee yet to be chosen shall be so bound by said terms and conditions upon agreeing to accept his employment. Each employee may enforce this agreement. The employees severally agree to render collectively to the employer services as musicians in the orchestra under the leadership of _____ as follows:

Name and Address of Place of Engagement _____

Date of Employment _____ Welfare _____ Cartage _____

Type of Engagement _____ Name of Room _____

Hours of Employment _____ Doubling _____

_____ Mileage and Transp. _____

Price Agreed Upon: $ _____ OVERTIME $ _____ per hour or part thereof.

In the event there is a SHOW of more than 20 Minutes (Cumulative time) to be played, said SHOW must be played by the entire Orchestra, and there will be an additional charge of $ _____ for playing of said SHOW, exclusive of Rehearsal time.

TOTAL PRICE AGREED UPON $ _____

This price includes expenses agreed to be reimbursed by the employer in accordance with the attached schedule, or a schedule to be furnished the employer on or before the date of engagement.

To be paid _____
(Specify when payments are to be made)

Upon request by the American Federation of Musicians of the United States and Canada (herein called the "Federation") or the local in whose jurisdiction the employees shall perform hereunder, the employer either shall make advance payment hereunder or shall post an appropriate bond.

ADDITIONAL TERMS AND CONDITIONS

If any employees have not been chosen upon the signing of this contract, the leader shall, as agent for the employer and under his instructions, hire such persons and any replacements as are required for persons who for any reason do not perform any or all services. The employer shall at all times have complete control over the services of employees under this contract, and the leader shall, as agent of the employer, enforce disciplinary measures for just cause, and carry out instructions as to selections and manner of performance. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. On behalf of the employer the leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandums supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the leader includes the cost of transportation, which will be reported by the leader to the employer.

All employees covered by this agreement must be members in good standing of the Federation. However, if the employment provided for hereunder is subject to the Labor-Management Relations Act, 1947, all employees, who are members of the Federation when their employment commences hereunder, shall be continued in such employment only so long as they continue such membership in good standing. All other employees covered by this agreement, on or before the thirtieth day following the commencement of their employment, or the effective date of this agreement, whichever is later, shall become and continue to be members in good standing of the Federation. The provisions of this paragraph shall not become effective unless and until permitted by applicable law.

To the extent permitted by applicable law, nothing in this contract shall ever be construed so as to interfere with any duty owing by any employee hereunder to the Federation pursuant to its Constitution, By-laws, Rules, Regulations and Orders.

Any employees who are parties to or affected by this contract are free to cease service hereunder by reason of any strike, ban, unfair list order or requirement of the Federation, and shall be free to accept and engage in other employment of the same or similar character or otherwise, for other employers or persons without any restraint, hindrance, penalty, obligation or liability whatever, any other provisions of this contract to the contrary notwithstanding.

Representatives of the local in whose jurisdiction the employees shall perform hereunder shall have access to the place of performance (except to private residences) for the purpose of conferring with the employees.

The performances to be rendered pursuant to this agreement are not to be recorded, reproduced, or transmitted from the place of performance, in any manner or by any means whatsoever, in the absence of a specific written agreement between the employer and the Federation relating to and permitting such recording, reproduction or transmission.

The employer represents that there does not exist against him, in favor of any member of the Federation, any claim of any kind arising out of musical services rendered for any such employer. No employee will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. If the employer breaches this agreement, he shall pay the employees, in addition to damages, 6% interest thereon plus a reasonable attorney's fee.

The employer, in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein, and, if applicable to the services to be rendered hereunder, acknowledges his liability to provide workmen's compensation insurance and to pay social security and unemployment insurance taxes.

To the extent permitted by applicable law, there are incorporated into and made part of this agreement, as though fully set forth herein, all of the By-laws, Rules and Regulations of the Federation and of any local of the Federation in whose jurisdiction services are to be performed hereunder (insofar as they do not conflict with those of the Federation), and the employer acknowledges his responsibility to be fully acquainted, now and for the duration of this contract, with the contents thereof.

The undersigned, whether signing this contract as principal, agent or otherwise, in order to induce Local 802, A. F. of M., to approve this contract, personally undertakes to pay, and will be principally responsible for the payment of all sums required to be paid hereunder.

_____ Employer's Name	_____ Leader's Name	Local No.
_____ Signature of Employer	_____ Signature of Leader	Membership Card No.
_____ Street Address	_____ Street Address	
_____ City State	_____ City State	
_____ Phone	_____ Booking Agent	

If this contract is made by a licensed booking agent, there must be inserted on the reverse side of this contract the name, address and telephone number of the collecting agent of the local in whose jurisdiction the engagement is to be performed.

COLLECTING AGENT OF LOCAL _____

ADDRESS _____ CITY _____ STATE _____

TELEPHONE _____

NAMES OF EMPLOYEES	LOCAL NUMBER	S. S. NUMBER	WAGES
_____ (LEADER)	_____	_____	$ _____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____

Analysis of Appendix D.

The client of the orchestra leader like Cutler is not in fact the employer of the orchestra. The purchaser of the music never really intends, even where he uses the "Form B" Contract, to be employer of the sidemen and the orchestra leader. *Bartels* v. *Birmingham*, 332 U. S. 126. Nor does the orchestra leader thereby intend to make his client the employer of the sidemen and of himself. The statement in the "Contract Blank" to the effect that the "employer" shall have "at all times * * * complete control over the services of employees under this contract" is an artificial and false label, which does not conform with the facts nor with the intention of the parties who execute the Form B "Contract Blank".

(a) The Form B language which designates the orchestra leader's client as the "employer" of both the orchestra leader and his sidemen is inserted in the said "Contract Blank" by Petitioners not because such designation ("employer") is the intention of the contracting parties, nor because in actual fact the client of the orchestra leader ever is or acts like the employer of the entire orchestra, but to shift the incidence of payroll taxes and to evade the antitrust laws of the United States which forbid combinations to fix prices between union officials and union members on the one hand and employers on the other, where collective bargaining and labor contracts are not employed.

(b) The spurious character of the "agreement" of the parties which Petitioners attempt to effectuate by means of the "Form B" Contract blank is apparent from the format and text of that blank. The "Additional Terms and Conditions" thereof are printed in such fine print as to discourage even the most inquisitive from reading them.

(c) Perhaps nothing is more indicative of the unreal "agreement" formally contrived by the "Form B" Contract than:

> "To the extent permitted by applicable law, there are incorporated into and made part of this agree-

ment, as though fully set forth herein, all of the By-laws, Rules and Regulations of the Federation and of any local of the Federation in whose jurisdiction services are to be performed hereunder."

The Constitution and By-Laws of AFM are set forth in a booklet of 222 pages. The Constitution and By-Laws of Local 802, is set forth in a booklet of some 70 pages. Local 802 now publishes a booklet entitled "Single Engagement Wage Scales and Single Engagement Minimums" (as replacement for the old Price List and Minimum booklets), which comprises 55 pages. Total: 347 pages.

(d) What client has the competence or even the will to dictate the "manner of performance" of an orchestra leader? What client would ordinarily have the ability to select appropriate pieces to be played? What self-respecting orchestra leader would permit the client to dictate his "manner of performance"? What sideman would regard the leader's client as his employer and as the person having the primary right to impose disciplinary measures against him or to give him orders and instructions? The leader, according to the "Form B" Contract is the "agent of the employer" [namely, of the client of the orchestra leader]. This means that the so-called "employer" has the principal right to enforce disciplinary measures for just cause. If the client were to walk up to the piano player or the saxophone player and discharge him or otherwise discipline him for some "just cause" within the client's imagination, would this be tolerated by the sideman, the orchestra leader, or even Petitioners? If the orchestra leader absconded with the money for the performance without paying the sidemen, would the sidemen be entitled to look to the client (who had already paid the leader for the engagement) for their wages? If the client fails to pay the leader and the sideman, Petitioners hold the leader responsible for the wages of the sidemen, even though the leader is, in their theory, just the agent of the client guilty of default. If the orchestra leader signed the "Form B" Contract on the space provided for the "Employer", would that, in Peti-

tioners' logic, make him the employer? If signature in that space by the client is efficacious to make the client an "employer", why does not signature by the leader in that space convert the leader into an employer even under the union argument?

(e) The falsity of the alleged agreements and intentions of the parties appears from:

> "The undersigned, whether signing this contract as principal, agent or otherwise, in order to induce Local 802, A. F. of M., to approve this contract, personally undertakes to pay, and will be principally responsible for the payment of all sums required to be paid hereunder."

Who is or who are "the undersigned"? There is space below for the "employer's name" and also for the "leader's name". Both are "the undersigned". Does this mean that both are "principally responsible for the payment of all sums to be paid hereunder"? Does the client, having paid the orchestra leader, regard himself as principally responsible for the payment of all sums under the "Form B" Contract, where the leader fails to pay?

(f) Nothing could be more unreal than:

> "If any employees have not been chosen upon the signing of this contract, the leader shall, as agent for the employer and under his instructions, hire such persons and any replacements as are required for persons who for any reason do not perform any or all services."

What client has ever done this? What client has ever intended this? What client has the competence or the will to hire sidemen for an orchestra? What client would know whether a cornet or a trombone is needed? What leader actually intends to serve as agent for the client and under the client's instructions when he (the leader) hires sidemen for his own orchestra?